6-12-2012

Akers v. Mortensen Appellant's Brief Dckt. 39182

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife, Plaintiffs/Respondents, v. VERNON J. and MARTI MORTENSEN, Defendants/Appellants, and D.L. WHITE CONSTRUCTION, INC., DAVID L. WHITE and MICHELLE V. WHITE, Defendants/Appellants.	) Supreme Court Docket No.:) Related Supreme Court Case Docket No.: 39293; 39182; 39493) Kootenai County Docket No.: 2002-222

APPELLANT MARTI MORTENSEN'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County. Honorable John T. Mitchell, District Judge, presiding.

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Statement of the Case

Nature of the case

This case is the latest iteration of an easement location and trespass dispute, which has been before this Court twice already. Basically there was a dispute by WHITE and MORTENSEN against AKERS as to whether, and where, they had an easement over AKERS's property to access adjoining property that was intended to be developed. WHITE and MORTENSEN resorted to self-help and allegedly went outside the easement, resulting in considerable difficulty. AKERS sued for trespass and The District Court found damages, punitive damages, treble damages and awarded attorneys fees.

The latest decision, No. 33587/33694 entered 6/4/2008, resulted in a remand to determine the precise location of the easement claimed by WHITE and MORTENSEN, and whether damages previously awarded remained appropriate in light of that location determination. MARTI MORTENSEN is now divorced from VERNON MORTENSEN and seeks to avoid liability for VERNON's punitive damage liability. Tr. Vol. 1 p. 206, 207.

Proceedings Below

Originally filed January 10, 2002, this dispute was tried beginning in September, 2002 and heard in sections though December, 2003. Judgment was entered 05/25/2004 and appealed. This court reversed and remanded the case in January, 2006. An amended judgment on remand was entered in December, 2006 and again appealed. This Court again reversed and remanded the matter by decision dated June 10, 2008.

Substantial additional proceedings occurred thereafter in District Court, in the nature of motion practice – there was no new testimony taken. Judge Mitchell finally entered his decision and Fourth Amended Judgement and Decree on Second Remand August 10, 2011. Tr. Vol. 3 P. 606.

In particular MARTI MORTENSEN moved to avoid application of Punitive Damages to her. Tr. Vol. 1 p. 209. AKERS objected, Tr. Vol. 1 p. 217 and the District Court struck MARTI MORTENSEN's motion. Tr. Vol. 1 p. 226.

MARTI MORTENSEN and VERNON MORTENSEN filed a notice of appeal on September 21, 2011. Tr. Vol. 3 p. 642. However a post-trial motion had been previously filed by Defendants WHITE, Tr, Vol. 3 p. 610, so this matter was held in abeyance pending resolution of those motions. Those motions were

decided and WHITE filed a notice of appeal on 12/13/2011. Tr. Vol. 3 p. 702. MARTI MORTENSEN is filing a separate motion to consolidate those appeals.

Statement of Facts

The statement of facts in Akers v. Mortensen No. 33587/33694 entered 6/4/2008 is attached as appendix A.

Subsequent briefing addressed the location of the easement and the applicability of various damages elements, but no new testimony was taken.

Issues Presented on Appeal

1. Did the Court below properly fix the size and location of the easement?

2. Are the amount of punitive damages awarded against VERNON MORTENSEN and MARTI MORTENSEN justified by the facts.

3. Are the Attorneys Fees awarded against VERNON MORTENSEN and MARTI MORTENSEN justified by the facts.

4. May MARTI MORTENSEN assert a claim to avoid imposition of punitive damages against her?

5. Should Judge Mitchell have recused himself?

Attorney Fees on Appeal

MARTI MORTENSEN does not seek attorneys fees on appeal.

Argument

MARTI MORTENSEN submits the following memorandum regarding burdens of proof.

1. Location of Easement

MARI MORTENSEN adopts as her argument the arguments presented by Appellants WHITE and VERNON MORTENSEN and incorporates the same herein by reference as if fully set forth.

2. Punitive Damages

This Court ruled in *Akers v. Mortensen*, 147 Idaho 39, 205 P.3d 1175 (2009):

> Without a determination of Appellants' easement rights, it is impossible to determine the scope of Appellants' trespass. Therefore, we vacate the district court's award of damages for negligent infliction of emotional distress and remand the issue for further determination after the district court determines Appellants' easement rights. For the same reason, we vacate the district court's award of punitive damages in favor of the Akers.

There was in fact an easement, 12.2 feet wide following a'shepard's crook' pathway, and WHITE and MORTENSEN had the right to use that path. The District Court found that VERNON MORTENSEN's trespass occurred outside of

that easement.

An award of punitive damages will be sustained only when it is shown that the defendant acted in a manner that was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983).

In this case the District Court found MORTENSEN's actions were knowingly done outside the scope of that easement. MORTENSEN submits that since the exact location was unknown and not determined until recently, the requisite mental state of intent cannot be shown. The only issue should be whether it was reasonable for MORTENSEN to believe that the actions taken were occurring within the easement.

More important, the amount of the award exceeds the limits suggested by this court in *Cox v. Stolworthy*, 94 Idaho 683, 496 P.2d 682 (1972) and modified by *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 904-905, 665 P.2d 661, 668-669 (1983). In the latter the court held that:

While no concrete formula for an award of punitive damages will control,

> the discretion of the trial judge will continue to be exercised within the general advisory guidelines laid down by this Court in the past. Mindful of the purpose of punitive damage awards, we note that they are not favored in the law and therefore should be awarded only in the most unusual and compelling circumstances. They are to be awarded cautiously and within narrow limits. ... An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences."... The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state be termed "malice, oppression, fraud or gross negligence" ... or simply "deliberate or willful" [Citations omitted]

In this case the award goes far beyond deterrence and is merely punishment. VERNON MORTENSEN is unlikely to get into easement disputes again: MARTI MORTENSEN will certainly **never** get into such a dispute since she doesn't do property development and is no longer married to VERNON. As such the policy of punitive damages is not served applying them in this amount and to MARTI.

3. Attorneys Fees

AKERS brought several causes of action but did not prevail on all of them. Their entitlement to attorneys fees flows from IRC 6-202 and applies only to those fees incurred to enforce the trespass provisions of that statute.

Bumgarner v. Bumgarner, 124 Idaho 629, 862 P.2d 321 (1993) recognizes

that fees must be apportioned:

> Gary is correct with respect to his assertion that where the parties have succeeded on entirely separate claims, those claims are properly distinguished and should be analyzed separately in determining whether attorney fees are appropriate. . . . We also note, however, that the trial court is authorized to award attorney fees only as provided by statute or contract. . . . In this case, the court based its award of fees on I.C. § 6-202. That statute, which applies to claims for intentional and wilful trespass, mandates an award of reasonable attorney fees in an action "brought to enforce the terms of this act if the plaintiff prevails." Id. As applied to the case at hand, this statute authorized the district court to award fees only to Kent, "the plaintiff" in that action, and then to award only those fees reasonably incurred in prosecuting the trespass action upon which he prevailed. Hence, even though the court found that Gary had prevailed on some of the claims asserted, it found no statutory basis upon which he would be entitled to any offsetting award. Consequently, and contrary to Gary's position, there was no basis for the court to apportion fees between the parties. Rather, the court was required to award Kent his full reasonable attorney fee attributable to his successful trespass claim. It is clear from the district court's memorandum opinion and order awarding attorney fees that the court considered the fact that a substantial amount of Kent's efforts were directed at claims upon which he did not prevail, specifically citing Kent's claim for trespass to the beach end of his property and Kent's claim for emotional distress. The court found, however, that some of the legal work performed on those claims overlapped with Kent's successful claim for trespass to the west end of his lot, and that Kent was entitled to recover those fees. . . . . Based upon its findings, which Gary does not dispute here, the court allocated one-half of all Kent's attorney fees, or $18,532.75, to the prosecution of the successful trespass claim. Upon this record, we conclude that the district court acted within the boundaries of its discretion and consistent with the legal standards applicable to its decision.

The burden to allocate fees must fall to AKERS as the party claiming fees. In this case the record does not reflect an apportionment of fees.

4. Punitive Damages Allocable to MARTI MORTENSEN

A. This Court should Rule That Punitive Damages may not be Collected from a Divorced Spouse

It is undisputed in this case that any punitive damages that may be awarded against MORTENSENS will be based upon actions by VERNON MORTENSEN; MARTI MORTENSEN was not present and did not herself participate in any way in those actions.

1. Basis of Community Liability for Intentional Torts of Spouse

As a general rule, community property of a spouse is subject to execution for intentional torts of the other spouse; but Idaho has not applied that rule to punitive damages.

In *Hansen v. Blevins*, 84 Idaho 49, 367 P.2d 758 (1962), Blevins, who operated the community property bar, sprayed tear gas into the face of Hansen, a customer, who sued and recovered damages which he sought to satisfy from the wife's share of community assets. The court analyzed decisions from several other

states and concluded,

> **It is not necessary to a decision in this case to determine whether community property is liable in all cases for the payment of obligations incurred by the tort of the husband.** Here the record shows that the defendant committed the battery while he was actively and actually engaged in the management of the community business, **and that what he did was intended to be for the protection of community property and in the interest of the community business.** Under such circumstances the community is responsible for his acts. *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 1181; *McHenry v. Short*, 29 Wash.2d 263, 186 P.2d 900; 41 C.J.S. Husband and Wife § 523. [Emphasis added]

The *McFadden* decision cited by the Court explained,

> It is not necessary, however, in order to bind the community, that the act which gives rise to the obligation, though tortious in its nature, shall actually benefit the community. It is sufficient that it was **committed by the spouse with the bona fide intention of protecting the interest of the community, and it makes no difference that the act was a mistake in judgment** -- a tort so far as it affected the rights of other people and ultimately detrimental to the interest of the community. [Emphasis added]

McFadden v. Watson, 51 Ariz. 110, 113, 74 P.2d 1181 (1938). Similarly in *McHenry v. Short*, 29 Wash.2d 263, 186 P.2d 900 (1947) the husband was in the act of ejecting the victim from premises which the community claimed to own, so the husband was acting in pursuance of his management of community property or in the furtherance of community business.

Then in *Hegg v. Internal Revenue Serv.*, 136 Idaho 61, 28 P.3d 1004 (2001) this Court ruled,

> **We have not previously addressed the issue of whether the community is liable for all tort obligations, even those which might be characterized as separate, and because of the nature of the tort obligation in this case, it is not necessary for us to reach that issue here.** . . . . Community assets may be reached to satisfy a debt incurred by one spouse's fraud committed during marriage even if the other spouse is completely innocent of the fraud and has no personal liability where the fraud benefits the community or occurs during the spouse's management of the community.

2. Idaho has not Decided if a Community is Liable for Punitive Damages

The general rule set out in *Hansen* and *Hegg* applies to intentional torts, but not necessarily to punitive damages. Punitive damages require more than mere intent: they require willful **and malicious** conduct. Once a spouse engages in willfully malicious conduct, he is no longer seeking to benefit the community.

> The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state be termed "malice, oppression, fraud or gross negligence"; "malice, oppression, wantonness"; or simply "deliberate or willful."

Manning v. Twin Falls Clinic & Hospital, Inc. 122 Idaho 47, 830 P.2d 1185 (1991), quoting *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d

661, 669 (1983).

The punitive damages award against MORTENSENS is based upon trespass and aggressive actions by VERNON MORTENSEN while trespassing. Similar conduct was found to support punitive damages in *Cox v. Stolworthy*, 94 Idaho 683, 496 P.2d 682 (1972).

A. Punitive Damages Against Agent Not Automatically Imputed to Principal

Idaho may impose liability on a principal for intentional misconduct of an agent. *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 854 P.2d 280 (1993). But Idaho does *not* automatically impose *punitive* damages against a principal for the acts of an agent. *Manning v. Twin Falls Clinic & Hospital, Inc.*, supra, held:

> It is settled beyond dispute in Idaho that **a principal is liable for punitive damages based on the acts of its agent only in circumstances in which the principal participated, or in which the principal authorized or ratified the agent's conduct**. ... Furthermore, it is well established that **punitive damages may not be assessed against a principal based upon the acts of an agent absent a clear showing of authorization or ratification.**

Griff, Inc. v. Curry Bean Co., 138 Idaho 315, 322, 63 P.3d 441, 448 (2003)

interpreted *Manning* to require that:

> To recover punitive damages against a corporation, one must show that an officer or director participated in, or ratified, the conduct underlying the punitive damage award.

Accord: *Vendelin v. Costco Wholesale Corp.* 140 Idaho 416 95 P.3d 34 (2004).

B. Punitive Damages are not Automatically imputed to a Codefendant

Verheyen v. Dewey, 27 Idaho 1, 146 P. 1116 (1915) held that even if one defendant was prompted by malicious motives in the acts that he did, the other defendant cannot be made liable on account of the malicious motives of his codefendant unless his codefendant is implicated in such malice.

C. Purpose of Punitive Damages is Deterrence

Finally we note that the primary purpose for punitive damages is deterrence of similar conduct. *Linscott v. Rainier National Life Insurance Co.*, 100 Idaho 854, 606 P.2d 958 (1980).

3. In This Case Punitives Should not Apply to MARTI MORTENSEN

Punitive damages were awarded against VERNON MORTENSEN due to his intentional, malicious actions in trespassing on AKERS' property without

knowing there was an easement. This Court may decide to reimpose punitives once the exact easement is determined.

MARTI MORTENSEN did not participate or even know about the actions of VERNON MORTENSEN, did not authorize or ratify his actions, and has since divorced VERNON (although the divorce is not complete as to property distribution).

However, the various policies embodied in the case law strongly argue that a Community should not be responsible for a spouse's conduct that supports punitive damages.

- Idaho cases making the Community liable for intentional torts are based upon agency principles, that the wrongdoer spouse was acting to benefit or protect the community.
- The punitive damages cases require the wrongdoer to go beyond mere intent, and to have acted with specific malice.
- Idaho recognizes that malice does not impute to the principal, even though intent may be imputed, unless the principal participates, authorizes or ratifies the malicious conduct.

- The purpose of punitive damages, deterrence, is not served by charging an innocent spouse with her husband's wrongdoing.
- Finally in this case, the marital community has, since the time of the incident, been terminated.

Based on this analysis, the court should conclude that a marital community – or more precisely, the other spouse's half of the marital community – is not liable for punitive damages asserted against one spouse, and no judgment should enter against the innocent spouse individually or jointly.

B. MARTI MORTENSEN should be permitted to raise this issue on remand

AKERS argued that the issues raised by MARTI MORTENSEN as to the applicability of punitive damages to her as a divorced spouse, were outside the scope of the remand.

1. Scope of Remand

This Court may determine whether punitive damages should apply jointly and severally to MARTI MORTENSEN. In *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, 142 Idaho 861, 136 P.3d 332 (2006) the Court held that:

> "Issues not raised below but raised for the first time on appeal will not be considered or reviewed." . . . . However, "[t]he general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, **or those which are subsidiary to the actions directed by the appellate court.**"

State v. Hosey, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000) involved a remand in a criminal case due to a suppression issue; the District Court permitted Hosey to withdraw his guilty plea on remand. The Court stated,

> There is no question that had we reversed the denial of the motion to suppress, yet remained silent about the withdrawal of the plea, the trial court would have had jurisdiction to allow Hosey to withdraw the guilty plea, if such an action complied with the terms of the plea agreement, because the withdrawal of the plea would clearly be a subsidiary action to the Court's reversal of the denial of the motion to suppress. This case is no different. Hosey's motion to withdraw his plea was within the trial court's jurisdiction on remand because ruling on the effect of an appellate court's decision under the terms of a plea agreement is necessarily subsidiary to any other directive on remand where a defendant has entered a conditional guilty plea.

Akers v. Mortensen, 147 Idaho 39, 205 P.3d 1175, 1183 (2009) specifically included the issue of joint and several liability in its remand:

> The district court awarded Sherrie Akers $10,000 for negligent infliction of emotional distress, **for which Appellants are jointly and severally liable**. To support a claim for negligent infliction of emotional distress, a party must prove a breach of a recognized legal duty. *Nation v. State, Dept. of Corr.*, 144 Idaho 177, 191, 158 P.3d 953, 967 (2007). In the instant case, the district court predicated the award of damages for negligent infliction of

> emotional distress on Appellants' malicious behavior while trespassing on the Akers' property. As we indicated in Akers I, the question of damages flowing from Appellants' conduct is inseparable from consideration of Appellants' easement rights. Akers I, 142 Idaho at 304, 127 P.3d at 207. Without a determination of Appellants' easement rights, it is impossible to determine the scope of Appellants' trespass. **Therefore, we vacate the district court's award of damages for negligent infliction of emotional distress and remand the issue for further determination after the district court determines Appellants' easement rights. For the same reason, we vacate the district court's award of punitive damages in favor of the Akers.** [Emphasis added]

MARTI MORTENSEN'S assertion of the issue of Community liability for punitive damages due to her husband's actions, is logically subsidiary to the determination of whether punitive damages apply at all. More simply, the entire issue of damages was put back on the table by the Supreme Court; this Court may consider whatever aspects thereof it chooses.

2. New Events

The original damages award was back in 2004; the MORTENSENS' divorce, which gave rise to this issue, did not occur until 2006. Hence the issue of whether punitive damages should apply to a divorced spouse was not ripe at the time of the original trial since the facts giving rise had not occurred yet. E.g., *Bell Rapids Mut. Irrigation Co. v. Hausner*, 126 Idaho 752, 754, 890 P.2d 338, 340

(1995).

MARTI MORTENSEN submits that the issue of punitive damages applying to her could not have been raised at the first trial, but is within the scope of the current remand.

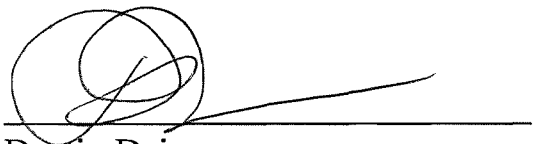
5. Recusal

MARTI MORTENSEN respectfully echoes the argument of other Appellants that Judge Mitchell should have recused himself.

Conclusion

MARTI MORTENSEN asks that this Court reverse the decision of the District Courted and remand with instructions that MARTI MORTENSEN not be assessed punitive damages, that Attorneys fees be apportioned, that Judge Mitchell be directed to recuse, and that all other relief requested by Appellants WHITE and VERNON MORTENSEN be granted.

May 31, 2012



Dustin Deissner
Attorney for MARTI MORTENSEN

CERTIFICATE OF SERVICE

Dustin Deissner certifies:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
VERNON J. MORTENSEN PO BOX 1922 BONNERS FERRY ID 83805	[X] US Mail 1st Class Postage Prepaid [ ] Delivery Service [ ] Facsimile to:
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Dated May 31, 2012

Dustin Deissner

APPENDIX A
Akers v. Mortensen Decision
Attached

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 33587/33694

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife,

Plaintiffs-Respondents,

v.

VERNON J. MORTENSEN and MARTI E. MORTENSEN, husband and wife,

Defendants-Appellants,

and

D.L. WHITE CONSTRUCTION, INC., DAVID L. WHITE and MICHELLE V. WHITE, husband and wife,

Defendants.

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife,

Plaintiffs-Respondents,

v.

D.L. WHITE CONSTRUCTION, INC., DAVID L. WHITE and MICHELLE V. WHITE, husband and wife,

Defendants-Appellants,

and

VERNON J. MORTENSEN and MARTI E. MORTENSEN, husband and wife,

Defendants.

Lewiston, March 2008 Term

2008 Opinion No. 68

Filed: June 4, 2008

Stephen Kenyon, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Honorable John T. Mitchell, District Judge.

The findings of fact and conclusions of law of the district court are vacated, and the case is remanded.

Givens Pursley, LLP, Boise, for appellants Mortensen. Terri Yost argued.

Robert Covington, Hayden, for appellants White.

James Vernon & Weeks, P.A., Coeur d'Alene, for respondents. Susan Weeks argued.

HORTON, Justice

This appeal arises from a bench trial concerning an easement and trespass dispute. Vernon and Marti Mortensen, David and Michelle White, and D.L. White Construction, Inc. (hereinafter collectively referred to as "Appellants") appeal the district court's judgment regarding the existence, scope, and location of Appellants' easement across Respondents Dennis and Sherrie Akers' property and the district court's award of compensatory and punitive damages for trespass and emotional distress. This Court previously decided an appeal concerning this case in *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 127 P.3d 196 (2005) (*Akers I*). We vacate the judgment and remand the case for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set out in detail in *Akers I*. There are four parcels of property involved in this case: "Government Lot 2," "Parcel A," "Parcel B" and the "Reynolds Property." The four parcels are rectangular and meet together at a four-way corner. Government Lot 2 is located to the northeast, and Parcel B is to the northwest. The Akers own the southwestern corner of Government Lot 2 and the southeastern corner of Parcel B. Parcel A is located to the southwest and much of Parcel A, including that adjoining Parcel B, is owned by the Whites. The Mortensens own a portion of Parcel A located to the south of that owned by the Whites. The Reynolds Property is located to the southeast and is not owned by any of the parties to this litigation. Together, the Whites and Mortensens plan to subdivide and develop their respective properties.

Government Lot 2 is bisected roughly north to south by a county road, Millsap Loop Road. Appellants hold an easement for ingress and egress to Millsap Loop Road across portions of the Akers' property. Because the properties meet at a four-way corner, Parcel A and Government Lot 2 do not actually share a border. It is therefore physically impossible to access Parcel A from Millsap Loop Road in Government Lot 2 without also passing through some other property.

The Akers acquired their real property in 1980. At the time of acquisition, a road provided access to Parcel A, running through the southern portion of Government Lot 2 and the southeastern corner of Parcel B. The access road was connected to Millsap Loop Road by an approach (the original approach) that turned sharply north from the access road, which runs east to west. The original approach was located on a blind curve in Millsap Loop Road. In order to obtain a building permit, the Akers were required to alter the entrance point of the access road where it connects to Millsap Loop Road, so that the entrance had a 30-foot line of sight in each direction of Millsap Loop Road. The Akers constructed a new approach (the curved approach), which starts to turn earlier and curves more gently to the north before meeting Millsap Loop Road. The Akers eventually quarreled with the Whites' predecessors in interest, the Peplinskis, over the Peplinskis' use of the access road, leading to the Peplinskis filing a lawsuit. The Peplinski/Akers suit ended in 1994 when the Peplinskis sold their property, including Parcel A, to the Mortensens. The Mortensens later sold much of Parcel A, including that portion adjoining Parcel B, to the Whites.

In January 2002, the Akers blocked Appellants' use of the curved approach to the access road and forbade Appellants from traveling on the western end of the access road where it passes through Parcel B before connecting to Appellants' property in Parcel A. Appellants then brought in heavy equipment, including a bulldozer, to carve a route around the Akers' gate and to otherwise alter the access road. This led to a series of confrontations between the Akers and Appellants, as well as alleged damage to the Akers' property and alleged malicious behavior by Appellants.

In response, the Akers filed the instant action for trespass, quiet title, and negligence. During the trial, the district court personally viewed the access road and property in question. The district court confirmed to Appellants an express easement 12.2 feet in width across the Akers' property in Government Lot 2, through the original approach, but not the curved

approach, to Millsap Loop Road. Although the district court confirmed Appellants' easement across part of the Akers' land, the court found that the easement ended at the western boundary of Government Lot 2 and did not cross into the Akers' property in Parcel B.

The district court also awarded the Akers compensatory damages arising from Appellants' trespass in the amount of $17,002.85, which was trebled pursuant to I.C. § 6-202 for a total of $51,008.55, to be paid by Appellants jointly and severally. Sherrie Akers was awarded $10,000 in compensatory damages for emotional distress, also to be paid jointly and severally by Appellants. Additionally, the district court entered punitive damage awards in favor of the Akers against the Mortensens in the amount of $150,000 and against the Whites in the amount of $30,000. Finally, the district court granted an award of costs and attorney fees to the Akers, to be paid jointly and severally by the Mortensens and Whites, in the amount of $105,534.06.

Appellants appealed from that judgment and the dispute came before this Court in *Akers I*. This Court remanded the case to the district court for additional fact finding and a determination regarding whether Appellants were entitled to a prescriptive easement or an easement implied from prior use. Additionally, we vacated the award of damages, costs, and attorney fees for further consideration in light of the district court's conclusions on remand regarding the scope of Appellants' easement rights.

On remand, the district court concluded that Appellants were not entitled to an implied easement from prior use because the access road was not reasonably necessary for the enjoyment of the dominant estate, Parcel A. The district court based this conclusion of law on its finding that, at the time of the severance of the dominant estate from the servient estate, there was a second road that provided access to Parcel A. The district court concluded that Appellants were entitled to a prescriptive easement across Government Lot 2, 12.2 feet in width, which was coextensive with the scope and location of the express easement. The district court also found the prescriptive easement passed from Government Lot 2 into Parcel B and immediately turned ninety degrees to the south to provide access to Parcel A. Based on these findings of fact and conclusions of law, the district court reinstated the award of damages, costs, and attorney fees from *Akers I*, and awarded the Akers their costs and attorney fees on remand. Appellants timely appealed from the district court's order on remand.

II. STANDARD OF REVIEW

Review of a trial court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Benninger v. Derifield*, 142 Idaho 486, 488, 129 P.3d 1235, 1237 (2006) (citing *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 949, 812 P.2d 253, 256 (1991)). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. *Rowley v. Fuhrman*, 133 Idaho 105, 107, 982 P.2d 940, 942 (1999) (citing *Sun Valley Shamrock Res., Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990)). A trial court's findings of fact will not be set aside on appeal unless the findings are clearly erroneous. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006) (citing *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 856, 55 P.3d 304, 310 (2002); *Bramwell v. South Rigby Canal Co.*, 136 Idaho 648, 650, 39 P.3d 588, 590 (2001); I.R.C.P 52(a)). If the findings of fact are based upon substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238 (citing *Hunter v. Shields*, 131 Idaho 148, 151, 953 P.2d 588, 591 (1998)). This Court will not substitute its view of the facts for that of the trial court. *Ransom*, 143 Idaho at 643, 152 P.3d at 4 (citing *Bramwell*, 136 Idaho at 648, 39 P.3d at 588). The findings of the trial court on the question of damages will not be set aside when based upon substantial and competent evidence. *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 846, 172 P.3d 1119, 1121 (2007) (citing *Idaho Falls Bonded Produce Supply Co. v. General Mills Rest. Group, Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983)).

III. ANALYSIS

Both sides to this appeal ask this Court to finally resolve their dispute. We are unable to fulfill their requests. We conclude that the district court's factual findings were based, in part, upon impermissible reliance on a viewing of the property. Normally, we would remand the case to the district court for additional findings of fact and conclusions of law consistent with this opinion. However, the parties have displayed a high degree of animosity towards each other and the district judge. We conclude that it is in the best interest of all parties involved, including the district judge, to vacate the judgment and remand the case for a new trial before a different

district judge. Although this remedy is rarely exercised by this Court, we find it best serves the interest of justice.

A. The district court erred when making factual findings relating to the scope and location of Appellants' prescriptive easement.

The district court relied upon its personal on-site view of the subject property to find certain facts relating to the scope of Appellants' prescriptive easement. This was error. Additionally, the district court's finding regarding the location of the easement on Parcel B was not supported by substantial and competent evidence.

The district court's finding that Appellants' prescriptive easement was 12.2 feet wide was based substantially on its view of the property. The district court specifically found that: "[Appellants'] argument that the easement should be 25 feet wide is simply unsupported by the record and a view of the premises." Appellants argued that the easement should be 25 feet wide, including ditches and shoulders. The district court, however, found that: "The view and the exhibits show that not all of the length of the roadway has ditches on either or both sides, nor did the view show any consistent 'shoulders.'" We conclude that the district court's reliance on its site view was error. It is well established in Idaho that the knowledge obtained by a jury view of a premises can only be used to determine the weight and applicability of the evidence introduced at trial and that a view of the premises "is not of itself evidence upon which a verdict may be based." *Tyson Creek R.R. Co. v. Empire Mill Co.*, 31 Idaho 580, 590, 174 P. 1004, 1007 (1918). When construing a prior Idaho statute that permitted a jury to view the premises in question, this Court held: "'The purpose of the statute is not to permit the taking of evidence out of court, but simply to permit the jury to view the place where the transaction is shown to have occurred, in order that they may the better understand the evidence which has been introduced.'" *State v. McClurg*, 50 Idaho 762, 796, 300 P. 898, 911 (1931) (quoting *State v. Main*, 37 Idaho 449, 459, 216 P. 731, 734 (1923)). Although these cases involve a viewing of the property by a jury, for purposes of appellate review, there is no analytical difference between a jury view and a court view. The policy underlying this rule of law is clear: the record must reflect the evidence upon which the finder of fact made its decision. This Court is simply unable to evaluate the basis of factual determinations made upon the basis of a view.

These rules remained intact when this Court adopted the Idaho Rules of Civil Procedure in 1958. Under I.R.C.P. 43(f), during a trial, the court may order that the court or jury may view the property that is subject to the action. This Court addressed the substantive weight afforded to

a court view in *Lobdell v. State ex rel. Bd. of Highway Dir.*, a case involving an inverse condemnation. 89 Idaho 559, 407 P.2d 135 (1965). In *Lobdell*, after the judge had viewed the property in question, the district court granted an offset to the plaintiff for restoration of access to their property that had been limited by curbing constructed by the defendant. *Id.* at 563, 407 P.2d at 137. This Court held the district court erred when it entered findings based on the results of an examination of the premises and noted that an inspection of the premises is only useful to evaluate and apply the evidence submitted at trial. *Id.* at 567-68, 407 P.2d at 139-40.

Idaho is not alone in adhering to this rule: *Bd. of Educ. of Claymont Special Sch. Dist v. 13 Acres of Land in Brandywine Hundred*, 131 A.2d 180 (Del. 1957); *Dade County v. Renedo*, 147 So.2d 313 (Fla. 1962); *Derrick v. Rabun County*, 129 S.E.2d 583 (Ga. 1963); *State v. Simerlein*, 325 N.E.2d 503 (Ind. App. 1975); *Guinn v. Iowa & St. L. R. Co.*, 109 N.W. 209 (Iowa 1906); *State v. Lee*, 63 P.2d 135 (Mont. 1936); *State by State Highway Comm'r v. Gorga*, 149 A.2d 266 (N.J. 1959); *Myra Found. v. U.S.*, 267 F.2d 612 (8th Cir. 1959) (applying North Dakota law); *In re Appropriation of Worth*, 183 N.E.2d 159 (Ohio 1962); *Port of Newport v. Haydon*, 478 P.2d 445 (Or. App. 1970); *Durika v. Sch. Dist. of Derry Township*, 203 A.2d 474 (Pa. 1964); *Ajootian v. Dir. of Pub. Works*, 155 A.2d 244 (R.I. 1959) (stating rule in dicta only); *Townsend v. State*, 43 N.W.2d 458 (Wis. 1950).

As previously noted, the district court found that the prescriptive easement turned ninety degrees to the south from the access road immediately upon entering Parcel B. This finding was not supported by substantial and competent evidence. The district court found that historically, the prescriptive easement "turned south on to defendants' land" and "'disappeared'" after crossing into Parcel B. We have carefully examined the exhibits upon which both Appellants and Respondents rely, as well as those addressed by the district court in its Order on Remand. There was testimony in the record, offered by Richard Peplinski, that the prescriptive easement traveled in a western direction across Parcel B for at least 125 feet before it curved onto his property to provide access to a Quonset hut. Although the Akers claim that the evidence on this subject is conflicting, we are not so persuaded. The aerial photograph upon which the Akers rely clearly shows a roadway resembling a shepherd's crook, extending well east into Parcel B before curving back to the southwest toward the Quonset hut. The exhibits offered by the Respondents are similar. All exhibits are consistent with Peplinski's testimony and reveal that the access road

traveled east into Parcel B before curving back towards the Quonset hut on Parcel A. For these reasons, we find this finding to be clearly erroneous.

The district court erred when it relied on its site view to find the scope of the easement and the district court's finding regarding the location of the easement on Parcel B is not based upon substantial and competent evidence. Therefore, the judgment establishing the location and scope of Appellants' easement must be vacated.

B. The district court's award of compensatory and punitive damages must be vacated.

The district court also erred when it reinstated the damage award from *Akers I*. That damage award was based, in part, upon the district court's view of the premises. The district court awarded the Akers trespass damages resulting from Appellants' efforts to improve the road on Parcel B. These improvements consisted of excavation and the dumping of fill to provide a road base. The district court found that these activities occurred to the west of where it located Appellants' prescriptive easement on Parcel B. We have determined that the district court's factual finding as to the location of the easement on Parcel B is clearly erroneous. The district court specifically found that it had "viewed the area, and f[ound] such excavation to have occurred further to the west of where the road immediately went into what would be the exact northeast corner of what is now [Parcel A]." The damage award also compensated the Akers for Appellants' trespass outside the scope of Appellants 12.2-foot prescriptive easement across Government Lot 2. As indicated above, the district court's finding that the scope of Appellants' prescriptive easement was 12.2 feet in width was based upon the district court's view of the premises. Accordingly, the entirety of the trespass damages award must be vacated.

The district court's determination of damages for emotional distress and its award of punitive damages related to conduct by Appellants in the course of that which the district court determined to be trespass. As the scope of trespass, if any, will be determined in a new trial, we vacate the entire award of compensatory and punitive damages. For the same reason, the district court's award of attorney fees and costs to the Akers is vacated.

C. This matter will be reassigned to a new district judge to conduct a new trial.

Normally, we would remand the case to the district court for additional findings of fact and conclusions of law. However, given the animosity woven into this case, we find it appropriate to remand the case for assignment to a new district judge. In fairness to the district judge, and the parties as well, we think it a difficult and uncomfortable task for the district judge

to now revisit and re-evaluate the evidence, disregarding his own earlier observations and factual determinations, particularly in light of allegations by Appellants that he cannot act impartially. Although such allegations rarely warrant reassignment, appellate courts in other jurisdictions have found it best to assign cases to a new trial judge in certain limited circumstances. *See Beck v. Beck*, 766 A.2d 482, 485 (Del. 2001); *In re Guardianship of Lienemann*, Not Reported in N.W.2d, 2004 WL 420158 (Neb. App. 2004); *In re Guardianship of R.G. and F.*, 382 A.2d 654, 658 (N.J. 1977); *In re Custody of A.L.A.P.-G.*, Not Reported in P.3d, 2003 WL 22234910 (Wash. App. 2003). This case is one of the rare instances in which reassignment is appropriate.

D. Neither party will receive an award of attorney fees on appeal.

The Akers and the Mortensens have each requested an award of attorney fees on appeal. As the Akers have not prevailed in this appeal, they are not entitled to an award of attorney fees. We cannot conclude that the Akers have frivolously defended this appeal. Accordingly, we deny the Mortensens' request for an award of attorney fees.

IV. CONCLUSION

The judgment is vacated and this case is remanded for a new trial before a different judge. Costs to Appellants.

Chief Justice EISMANN and Justices BURDICK, J. JONES and Justice Pro Tem TROUT, **CONCUR**.